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RECEIVED

March 19, 2004

MAR 19 2004

Thomas M. Dorman
Public Service Commission
211 Sower Blvd.
P. O. Box 615
Frankfort, KY 40601

PUBLIC SERVICE
COMMISSION

2004-00090

Re: In the Matter of: Brandenburg Telephone Company v. Kentucky ALLTEL, Inc. before the Public Service Commission of the Commonwealth of Kentucky

Dear Mr. Dorman:

Enclosed for filing with the Public Service Commission of the Commonwealth of Kentucky is an original and eleven (11) copies of the Complaint of Brandenburg Telephone Company against Kentucky ALLTEL, Inc.

Thank you, and if you have any questions, please call me.

Very truly yours,

DINSMORE & SHOHL LLP



John E. Selent

JES/bmt
Enclosures

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**COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION**

In the Matter of:

BRANDENBURG TELEPHONE COMPANY

Complainant

v.

KENTUCKY ALLTEL, INC.

Defendant

Case No. _____

COMPLAINT

Brandenburg Telephone Company ("Brandenburg Telephone"), by counsel, for its complaint against Kentucky ALLTEL, Inc. ("Kentucky ALLTEL"), pursuant to KRS 278.260, hereby states as follows.

1. The full name and address of Brandenburg Telephone is Brandenburg Telephone Company, 200 Telco Drive, Brandenburg, Kentucky, 40108. Brandenburg Telephone is a local exchange carrier providing service to all or parts of Meade, Breckenridge and Hardin Counties, Kentucky.

2. The full name and address of Kentucky ALLTEL is Kentucky ALLTEL, Inc., One Allied Drive, Little Rock, Arkansas 72202. Kentucky ALLTEL is a local exchange carrier providing local exchange carrier service. Kentucky ALLTEL is an affiliate of a publishing company known as ALLTEL Publications, with whom Kentucky ALLTEL contracts to publish telephone books to meet Kentucky ALLTEL's legal obligation to provide directory listing information for all working telephone numbers (except non-published and unlisted numbers) in Kentucky ALLTEL's service territory.

3. The facts supporting this complaint are set forth more fully below; but briefly, this complaint concerns Kentucky ALLTEL's refusal to revise the "Agreement for the Provision of Subscriber List Information ("SLI")" in violation of applicable law in the following three ways. First, Kentucky ALLTEL will not execute this agreement with Brandenburg Telephone; instead, it is demanding that Brandenburg Telephone execute the agreement with ALLTEL Publications, and not with Kentucky ALLTEL. Second, the standard form contract for the provision of SLI mandates that Delaware, rather than Kentucky law govern the agreement. And, third, the standard form contract for providing SLI requires that all disputes between the parties be arbitrated. Brandenburg Telephone objects to these provisions and has asked that the standard SLI agreement be revised. Kentucky ALLTEL has refused.

Applicable Law

4. Pursuant to KRS 278.040, the Commission has jurisdiction "over the regulation of rates and service of utilities" within the Commonwealth. *Id.*

5. Pursuant to KRS 278.260 the Commission is vested with the express authority to investigate and remedy "complaints as to rates or service of any utility." *Id.*

6. Pursuant to 47 U.S.C. § 222(e), "a telecommunications carrier that provides telephone exchange service must provide subscriber list information gathered in its capacity as a provider of such service on a timely and unbundled basis, under nondiscriminatory and reasonable rates, *terms, and conditions*, to any person upon request for the purpose of publishing directories in any format." *Id.* (Emphasis supplied). ALLTEL Publications is not such a telecommunications carrier.

7. Pursuant to KRS 278.030(2), every "utility" must "furnish adequate, efficient and *reasonable service* and may establish reasonable rules governing the conduct of its business and

the conditions under which it shall be required to render service." *Id.* (Emphasis supplied). ALLTEL Publications is not such a utility.

Statement of the Facts

8. For purposes of publishing one or more telephone directories for geographic areas in which Kentucky ALLTEL provides local exchange services, Brandenburg Telephone sought to enter into a SLI agreement with Kentucky ALLTEL pursuant to which Kentucky ALLTEL would provide SLI for the exchanges it serves.

9. Kentucky ALLTEL provided Brandenburg Telephone with its "blanket" agreement for SLI information, which was a form contract generated by Kentucky ALLTEL. But, this blanket agreement is with ALLTEL Publications, and not Kentucky ALLTEL.

10. Finding some of the SLI Agreement's provisions objectionable, and in an effort to correct minor drafting mistakes, Brandenburg Telephone wrote Kentucky ALLTEL on December 30, 2003 and requested that Kentucky ALLTEL revise parts of its standard SLI agreement. The letter described the proposed changes and provided Brandenburg Telephone's reasons for requesting each. (A copy of this December 30th letter is Exhibit A).

11. Because Brandenburg Telephone had not received a response to its December 30, 2003 letter, legal counsel to Brandenburg Telephone contacted Jimmy Dolan at Kentucky ALLTEL on January 13, 2003 in an effort to resolve the matter. Dolan stated that he did not understand why there would be any problem making any of the changes proposed by Brandenburg Telephone.

12. On January 14, 2004, Brandenburg Telephone received a letter from Connie Flanagan, the Listing Management Director. The letter stated that ALLTEL Publications had a

"blanket" agreement for SLI information, and that ALLTEL Publications would not "deviate or alter that agreement for any subscriber." (A copy of that letter is Exhibit B).

13. Due to these conflicting accounts, and because Kentucky ALLTEL's letter of January 12, 2004 had been sent before counsel's telephone conversation with Mr. Dolan on January 13, 2003, counsel to Brandenburg Telephone once again contacted Mr. Dolan on January 16, 2004 to inquire about the status of the matter. Mr. Dolan stated that Kentucky ALLTEL would be in contact within the next "day or so."

14. Steve Rowell, in house counsel to Kentucky ALLTEL, contacted Brandenburg Telephone's legal counsel on or around February 17, 2004. Mr. Rowell apparently delegated the resolution of the matter to Mr. Stephen T. Refsell. In a series of e-mails exchanged between Mr. Refsell and counsel to Brandenburg Telephone, Mr. Refsell indicated that, of the changes proposed by Brandenburg Telephone: only (i) the identity of the contracting party (Kentucky ALLTEL versus ALLTEL Publications); (ii) the governing law provision (Delaware versus Kentucky); and (iii) the arbitration provision, presented "major problems." Mr. Refsell indicated, however, that even those issues were "probably resolvable."

15. Thus, the changes to which Kentucky ALLTEL *did not* agree are as follows.

- a. Making Kentucky ALLTEL, Inc. (instead of ALLTEL Publications) bound under the Agreement, as provided for in the Preamble;
- b. Changing the governing law to Kentucky (rather than Delaware) law in Section 13; and
- c. Deleting the arbitration provision contained in Section 22.

16. The changes to which Kentucky ALLTEL apparently *did* agree are as follows.

- a. Section 1. Defined Terms: Defining subscriber listing information ("SLI") to include directory listing information for Brandenburg Telecom LLC ("BTLLC") customers.
 - b. Section 3. Provision of Listing Information: Obliging Kentucky ALL-TEL to provide BTLLC SLI to Brandenburg Telephone, as is already required by federal law.
 - c. Section 10. Term & Termination: Deleting "continue in full force and effect for a period" and "unless otherwise terminated as provided herein," which are both drafting errors, and specifying that termination of the SLI Agreement may occur upon thirty (30) days prior written notice, or immediately, upon breach of the SLI Agreement.
 - d. Section 17. Notice and Demand: Adding "Brandenburg Telephone Company, 200 Telco Drive, Brandenburg, KY 40108" and "John E. Selent, Esq., Dinsmore & Shohl LLP, 1400 PNC Tower, 500 West Jefferson St., Louisville, KY 40202" as the parties to receive notice pursuant to the SLI Agreement.
- and -
- e. Schedule A. Subscriber Listing Request: Deleting the following exchange names and NXX's: Horse Cave, Magnolia, Buffalo; and 324, 325.

17 Consequently, counsel to Brandenburg Telephone attempted several times to set up a telephone conference call to try to reach an agreement with respect to the three outstanding issues. (See ¶15 above). On March 4, 2004, this conference call was held, and resolution of the

three outstanding issues proved impossible. Subsequent attempts to resolve this matter have likewise failed.

18. Kentucky ALLTEL's insistence that the SLI Agreement be with ALLTEL Publications (which is not a utility) rather than with Kentucky ALLTEL (which is a utility) is unreasonable within the meaning of KRS 278.030(2) because it represents the delegation of a non-delegable duty of a utility to an entity which is not a utility. For the same reason, because ALLTEL Publications is not a "telecommunications carrier" within the meaning of 47 U.S.C. §222(e), Kentucky ALLTEL's refusal to execute the SLI Agreement with Brandenburg Telephone is a violation of its duty to provide Brandenburg Telephone with SLI "on a timely and unbundled basis, under nondiscriminatory and reasonable rates, terms, and conditions" *Id.*

19. Kentucky ALLTEL's insistence that the SLI Agreement be governed by Delaware law, rather than Kentucky law, is also a violation KRS 278.030, which requires a utility to "establish *reasonable* rules governing the conduct of its business and the conditions under which it shall be required to render service." *Id.* (Emphasis supplied). Because the SLI Agreement will be entered into in Kentucky, performed in Kentucky (by at least one Kentucky corporation), and subject to the jurisdiction of the Public Service Commission of the Commonwealth of Kentucky, Kentucky ALLTEL's insistence that the SLI Agreement be governed by the laws of Delaware is unreasonable.

20. Kentucky ALLTEL's insistence upon an arbitration clause in the SLI Agreement is in violation of KRS 278.030 and 47 U.S.C. § 222(e). The provision of SLI upon the condition that the requesting carrier relinquish its rights to seek redress from regulatory bodies or courts under these statutes is unreasonable.

WHEREFORE, Brandenburg Telephone Company respectfully requests that the Public Service Commission:

A. Order Kentucky ALLTEL (rather than ALLTEL Publications) be a party to the SLI Agreement with Brandenburg Telephone;

B. Order that the SLI Agreement be governed by the laws of the Commonwealth of Kentucky; and

C. Order that the SLI Agreement not be subject to arbitration;

D. Order that the SLI Agreement between Brandenburg Telephone and Kentucky ALLTEL contain the following modifications, to which Kentucky ALLTEL has apparently already agreed:

- i. Section 1. Defined Terms: Defining subscriber listing information ("SLI") to include directory listing information for Brandenburg Telecom LLC ("BTLLC") customers;
- ii. Section 3. Provision of Listing Information: Obligating Kentucky ALLTEL to provide BTLLC SLI to Brandenburg Telephone, as is already required by federal law;
- iii. Section 10. Term & Termination: Deleting "continue in full force and effect for a period" and "unless otherwise terminated as provided herein," which are both drafting errors, and specifying that termination of the SLI Agreement may occur upon thirty (30) days prior written notice or immediately, upon breach of the Agreement;
- iv. Section 17. Notice and Demand: Adding "Brandenburg Telephone Company, 200 Telco Drive, Brandenburg, KY 40108" and "John E.

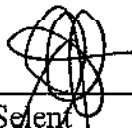
Selent, Esq., Dinsmore & Shohl LLP, 1400 PNC Tower, 500 West Jefferson St., Louisville, KY 40202" as the parties to receive notice pursuant to the Agreement; and

- v. Schedule A. Subscriber Listing Request: Deleting the following exchange names and NXX's: Horse Cave, Magnolia, Buffalo; and 324, 325;

- and -

- E. Grant all other relief to which Brandenburg Telephone may appear to be entitled.

Respectfully submitted,



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**COUNSEL TO BRANDENBURG
TELEPHONE COMPANY**

EDWARD T. DEPP
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tip.depp@dinslaw.com

December 30, 2003

FIRST-CLASS MAIL

Connie Flanagan, Director
Kentucky ALLTEL, Inc.
One Allied Drive
Little Rock, AR 72202

Re: Agreement for the Provision of Subscriber List Information

Dear Ms. Flanagan:

We are legal counsel to Brandenburg Telephone Company. The purpose of this letter is to request that Kentucky ALLTEL, Inc. ("ALLTEL") revise its "Agreement for the Provision of Subscriber List Information" (the "Agreement"), as indicated by red-line in the attached revised Agreement and for the reasons set forth below. A copy of the proposed, revised Agreement is attached for your convenience.

• Preamble: The Agreement should be between Kentucky ALLTEL, Inc., and it should list Brandenburg Telephone Company's address as 200 Telco Drive. We assume that there is no problem with adding "Drive" to Brandenburg Telephone Company's address. If there is some reason that the Agreement must be with ALLTEL, Inc. (and not Kentucky ALLTEL, Inc.), please let us know. Otherwise, we request that ALLTEL agree to the changes proposed in the Preamble of this Agreement.

Section 1. Defined Terms: Brandenburg Telephone's proposed revisions to this section clarify that subscriber listing information ("SLI") includes directory listing information for Brandenburg Telecom LLC ("BTLLC") customers. As the incumbent carrier in BTLLC's territory, ALLTEL already collects SLI for BTLLC's end-users. Moreover, section 222 of the Telecommunications Act of 1996 (the "Act") requires ALLTEL to share the SLI information it collects, which should include updated SLI information.

Therefore, we request that ALLTEL agree to the changes proposed in section 1 of the Agreement.

Section 3. Provision of Listing Information: Brandenburg Telephone's proposed revision to this section merely clarifies that the revisions made in section 1 of the Agreement shall obligate ALLTEL to provide BTLLC SLI to Brandenburg Telephone, as is already required by federal law. Accordingly, for the reasons set forth in the section immediately above, we request that ALLTEL agree to the changes proposed in section 3 of the Agreement.

Section 10. Term & Termination: Brandenburg Telephone's proposed revisions to this section merely correct three obvious grammatical errors contained in the original document and specify that termination of the Agreement may occur upon thirty (30) days prior written notice or immediately, upon breach of the Agreement. These revisions have virtually no substantive impact on the terms of the Agreement; and accordingly, it is senseless for ALLTEL to refuse these revisions. Therefore, we request that ALLTEL agree to the changes proposed in section 10 of the attached Agreement.

Section 13. Governing Law: Brandenburg Telephone has proposed that the Agreement be governed by Kentucky law, not Delaware law. We are not sure why ALLTEL would refuse to agree to this revision, given that the Agreement will be entered into in Kentucky, performed in Kentucky (by at least one Kentucky corporation), and subject to the jurisdiction of the Kentucky Public Service Commission. Therefore, we request that ALLTEL agree to the changes proposed in section 13 of the attached Agreement.

Section 17. Notice and Demand: Brandenburg Telephone has simply modified this section to reflect the appropriate individuals who should receive notices on behalf of Brandenburg Telephone. We are unsure why ALLTEL would refuse to make this revision. Therefore, we request that ALLTEL agree to the changes proposed in section 17 of the Agreement.

Section 22. Arbitration: Brandenburg Telephone has proposed that the arbitration clause in this Agreement be stricken. Section 222(e) of the Act provides that "a telecommunications carrier that provides telephone exchange service shall provide subscriber list information gathered in its capacity as a provider of such service on a timely and unbundled basis, under nondiscriminatory and reasonable rates, terms, and conditions, to any person upon request for the purpose of publishing directories

in any format." 47 U.S.C. § 222(e) (emphasis added). The provision of subscriber listing information upon condition that the requesting carrier relinquish its rights to seek redress from regulatory bodies or courts with jurisdiction over the matter is wholly unreasonable. Therefore, we request that ALLTEL agree to strike section 22 from the Agreement.

Schedule A. Subscriber Listing Request: Brandenburg Telephone has proposed to delete the following exchange names and NXX's: Horse Cave, Magnolia, Buffalo; and 324, 325. We are unsure of ALLTEL's point in refusing to make these revisions, because ALLTEL does not even own these exchanges. Moreover, ALLTEL cannot force Brandenburg Telephone to accept SLI from unwanted exchanges and/or NXX's. Therefore, we request that ALLTEL accept Brandenburg Telephone's proposed revisions for this section of the Agreement.

Please inform us in writing, within ten (10) calendar days, whether ALLTEL will agree to the revisions proposed by Brandenburg Telephone Company.

Thank you.

Sincerely,

DINSMORE & SHOHL LLP



Edward T. Depp

ETD/pa

cc: SLI Department, ALLTEL Corporation (w/ encl.)
Vice President of Law, ALLTEL Corporation (w/ encl.)
John E. Selent, Esq. (w/o encl.)

ALLTEL PUBLISHING

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Erie, PA 16505-0522

814-838-5200
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January 12, 2004

Mr. Edward T. Depp
Dinsmore & Shohl LLP
1400 PNC Plaza-500 West Jefferson Street
Louisville, Kentucky 40202

Re: Agreement for the Provision of Subscriber List Information

Dear Mr. Depp:

This is in reference to your letter of December 30th representing Brandenburg Telephone Company's request that we revise ALLTEL's Agreement.

ALLTEL Publishing has an established blanket "Agreement for the Provision of Subscriber List Information" (the "Agreement") and we do not deviate or alter that agreement for any subscriber. We strive for consistency with all of our customers.

Should there be any questions or problems, please feel free to contact me.

Sincerely,

A handwritten signature in cursive script that reads "Connie Flanagan".

Connie Flanagan
Listing Management Director

Cc: S. Gidorkis
J. Meucci
E. Zupan